

BRB No. 99-1142 BLA

DANNY D. OSBORNE)
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 Claimant-Petitioner)
)
 v.)
)
 P-F MINING, INCORPORATED)
)
 and)
)
 WEST VIRGINIA COAL-WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,))
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Party-in-Interest)

DATE ISSUED: _____

DECISION and ORDER

Appeal of the Decision and Order Denying Waiver From Recovery of Overpayment of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

K. Keian Weld (State of West Virginia Employment Programs Litigation Unit), Charleston, West Virginia, for employer/carrier.

Rita Roppolo (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Waiver From Recovery of Overpayment (99-BLO-0004) of Administrative Law Judge Edward Terhune Miller (the administrative law judge) regarding the computation of an overpayment on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Applying the regulations at 20 C.F.R. Part 725, the administrative law judge found the amount of the overpayment to be \$55,650.30. He rejected claimant's contention that the district director's accounting method, known as the "up-front" method, was invalid and that claimant's legal fees and medical expenses incurred in obtaining a second injury life award from the state of West Virginia, should have been deducted from the overpayment which resulted from his award of benefits under the Act. Specifically, the administrative law judge determined that the legal and medical expenses incurred by claimant in obtaining his second injury life award from the State of West Virginia did not offset his overpayment because, pursuant to the "up-front" accounting method employed by the district director, these expenses were considered deducted to claimant from the initial payments of state benefits, which were awarded effective in 1989, and were not considered paid out of claimant's benefits under the Act, which were awarded effective in 1991.¹ The administrative law judge thus held that claimant was "not entitled to a waiver of recovery of this overpayment" and ordered claimant to pay \$55,650.30. Decision and Order at 5. The administrative law judge indicated that the Director, Office of Workers' Compensation Programs (the Director), was, therefore, entitled to recover the overpayment, with interest.

On appeal, claimant contends that there is no statutory or regulatory basis for the Director's "up-front" method of calculating the amount that an overpayment may be offset by

¹By Decision and Order dated July 15, 1993, Administrative Law Judge Julius A. Johnson awarded benefits under the Act with July 1, 1991 as the date of onset. Director's Exhibit 3. On January 21, 1998, the State of West Virginia awarded claimant a second injury life award with October 12, 1989 as the date of onset. Director's Exhibits 11, 12.

a claimant's legal and medical expenses incurred in obtaining a state award of benefits. Claimant challenges the administrative law judge's application of the "up-front" method in the instant case, which resulted in claimant being denied a reduction or offset of the overpayment amount. Claimant argues,

Since the majority of overpayment cases involve payment to the Department of Labor, claimant submits that the Department of Labor's approach in this claim is simply an effort to maximize the size of an overpayment in all cases.

Id. at 5. Claimant argues that the case should be remanded to the district director with instructions to find that the amount of the overpayment, payable to employer, is \$24,266.91, or \$55,650.30 minus the \$31,318.39 claimant expended in pursuit of his state award. Employer/carrier (employer) and the Director respond, and seek affirmance of the decision below.²

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The undisputed facts in this case are as follows: Administrative Law Judge Julius A. Johnson awarded Federal benefits by Decision and Order dated July 15, 1993, with the award effective July 1, 1991, payable by employer. Director's Exhibit 3. The West Virginia Bureau of Employment Programs, Workers' Compensation Division, awarded claimant a second injury life award on January 21, 1998, effective October 12, 1989, with fifty percent of claimant's disability attributable to his occupational pneumoconiosis. Director's Exhibits 11, 12. The district director was advised of the state award and asked claimant's counsel to submit evidence of attorney fees and medical costs incurred by claimant in his pursuit of the state award. Director's Exhibit 10. Claimant's counsel responded that claimant expended \$27,546.92 in attorney fees and \$3,771.47 in "expenses." Director's Exhibit 12. Because

² Each party recognizes that claimant's liability for the overpayment is to employer, not the Director, as the administrative law judge indicated. Decision and Order at 5. Further, the Director correctly notes that, contrary to the administrative law judge's indication, waiver of recovery of the overpayment is not at issue in the instant case.

fifty percent of the state award completely offset the benefits under the Act that claimant was awarded beginning in 1991, the district director informed claimant that he had been overpaid benefits in the amount of \$55,650.30 and ordered claimant to reimburse employer. The district director also indicated that because the state benefits began in 1989 and the attorney fees and medical expenses incurred by claimant in connection with the state claim are “deducted” from the beginning of the state award, those legal fees and medical costs did not reduce the overpayment. Director’s Exhibit 13. Claimant challenged the district director’s order and, upon claimant’s request, a hearing was held before the administrative law judge. In the ensuing Decision and Order, which is the subject of the instant appeal, the administrative law judge rejected claimant’s argument that the district director erred in his method of computing the amount of the overpayment.

Under the Act, the benefits payable by a liable party may be offset or reduced by the amount of benefits that a claimant receives under any state workers’ compensation law because of death or partial or total disability due to pneumoconiosis. 30 U.S.C. §§922(b), 932(g); 20 C.F.R. §§725.533(a)(1), 725.535. The regulations further provide that amounts for medical, legal or related expenses incurred by a claimant in connection with his state claim are excluded in computing this reduction. 20 C.F.R. §725.535(d). Neither the Act nor the regulations provides guidance as to how such expenses are to be excluded from the offset calculation.

The Director developed a method of offset calculation know as the “up-front” method. The Director, in his brief in the instant appeal, describes this method as follows:

Absent evidence that a state award or state law requires a particular method for paying attorney fees or medical expenses, or that the parties have in fact agreed to a different method of paying, the Director will presume that a claimant will use as much of his initial benefit payments as is necessary to pay his fees and expenses.

Director’s Brief at 3. In *Director, OWCP v. Barnes and Tucker Co. [Molnar]*, 969 F.2d 1524, 16 BLR 2-99 (3d Cir. 1992), the United States Court of Appeals for the Third Circuit indicated that the “up-front” method “is better suited to effectuate the remedial purpose of the Black Lung Benefits Act,” in that a level of benefits payments to claimants, from state and/or federal benefits, is ensured. *Molnar*, 969 F.2d at 1529, 16 BLR at 2-107. The court gave deference to the Director’s “up-front” method of apportioning legal fees by reasoning that the determination of how attorney’s fees are to be apportioned is a policy decision and “the Director is the body within the Department of Labor authorized to make Black Lung policy.” *Id.* at 969 F.2d at 1527, 16 BLR at 2-104. The Board, in *Cadle v. Director, OWCP*, 18 BLR 1-56 (1994), a case arising, as does the instant case, within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, noted the Fourth Circuit’s statement in *Shuff*

v. Cedar Coal Co., 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993), citing *BethEnergy Mines, Inc. v. Pauley*, 501 U.S. 680, 15 BLR 2-155 (1991), *aff'g* 890 F.2d 1295, 13 BLR 2-162 (3d Cir. 1989) and *Adkins v. Director, OWCP*, 878 F.2d 151, 12 BLR 2-313 (4th Cir. 1989), that “the Director’s interpretation of the regulations is entitled to substantial deference from this court.” *Cadle*, 18 BLR at 1-62. In *Cadle*, the Board deferred to the Director’s interpretation of Section 725.535(d) and accepted the “up-front” method of calculation, vacated the administrative law judge’s contrary offset calculation and remanded the case to the district director for collection of the overpayment.

We affirm the administrative law judge’s calculation of the overpayment, based on the Director’s “up-front” method, and uphold his finding that claimant is not entitled to offset the overpayment of benefits under the Act by the \$31,318.39 in legal fees and medical costs which he expended in pursuit of his state award. The administrative law judge’s application of the “up-front” method correctly resulted in claimant’s legal fees and medical expenses incurred in pursuit of his state award, being considered to be paid out of his initial state compensation benefits, awarded beginning in 1989. These expenses, totaling \$31,318.39, were thus paid for by the time claimant began receiving benefits under the Act, awarded beginning in 1991. Contrary to claimant’s contention, the administrative law judge’s finding, that claimant is not entitled to any offset or reduction in the overpayment amount of \$55,650.30, is consistent with applicable law. 20 C.F.R. §725.535(d); *see Molnar, supra; Cadle, supra*. We thus affirm the administrative law judge’s finding that claimant is liable for an overpayment of benefits under the Act in the amount of \$55,650.30. Further, claimant is liable to employer for the overpayment and to the extent that the administrative law judge indicated to the contrary, his Decision and Order is modified. *See* discussion, *supra* n.1.

Accordingly, the administrative law judge’s Decision and Order is affirmed in part and modified in part, and the case is remanded to the district director for collection proceedings.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge